RESORT VILLA DEVELOPMENT SDN BHD

v.

NIWATIME HEALTH MANAGEMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-813-2003]
18 JULY 2005

CIVIL PROCEDURE: *Pre-trial - Case management - Non compliance with court's directions - Defendant showing lack of interest in proceedings - Whether judgment to be entered for plaintiff - Whether defendant's counter claim dismissed - Rules of the High Court 1980, O. 34 r. 7*

The court in this case was undertaking a case management exercise. Form 63, the notice for case management was filed on 11 March 2004 and the first case management hearing was fixed for 18 May 2004. The defendant's counsel was absent during the first case management hearing and had asked the plaintiff's counsel to mention on his behalf. During the second case management proceeding of 27 September 2004 the defence was not ready for case management; and the reason given was weak considering that there was a long lapse of more than four months since the previous case management date of 18 May 2004. The court had granted an adjournment and the case management hearing was adjourned to 8 February 2005. However, the defendant then failed to comply with the court's direction given during the case management proceeding on 8 February 2005 during which the defendant requested for another adjournment. The court as well as the counsel for the plaintiff allowed an adjournment to enable the defendant to make their application to amend the statement of defence. Accordingly the court adjourned the case management hearing and directed the defence to file its application to amend the statement of defence on or before 15 March 2005; and the court fixed 18 July 2005 as the date for the next case management proceeding. However, on 18 July 2005, the counsel for the defendant was again absent without giving any reason, and it was found that the defence had not filed their application to amend the statement of defence.

Held (judgment for the plaintiff):

[1] Although Form 63 was filed back in March 2004, yet on 18 July 2005, more than one year and four months later, due to the apparent lackadaisical attitude or lack of interest on the part of the defence in the proceeding, the court was still unable to proceed with the case management proper.

By being absent on 18 July 2005 and not complying with the court's directions, the defendant was abusing the court's and plaintiff's past generosity towards the defence. The decision was based on O. 34 r. 7 of the Rules of the High Court 1980. The court thus gave judgment in favour of the plaintiff. (p 339 c-e)

[Defendant's counter-claim dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 34 r. 7

For the plaintiff - HH Tay; M/s Tay & Helen Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:
In this writ action, the writ and statement of claim was filed on 24 June 2003. The statement of defence and counter-claim were filed on 5 August 2003. The plaintiff's reply and statement of defence to the defendant's statement of defence and counter-claim were filed on 25 August. The plaintiff's amended reply and statement of defence to the defendant's statement of defence and counter-claim were filed on 4 March 2004.

Form 63, that is to say, the notice for case management was filed on 11 March 2004.

The first case management hearing was fixed for 18 May 2004 (the first case management hearing date).

On 18 July 2005 (the 4th case management hearing date), during case management proceeding, I gave judgment in favour of the plaintiff with costs, and I also dismissed the defendant's counter-claim (also with costs).

I so decided for the following reasons.

Firstly, on that day (18 July) the defendant's counsel failed to attend the proceeding without a valid reason, although at the previous case management proceeding of 8 February 2005 (3rd case management hearing date) he had been directed to attend court on 18 July 2005 for further case management. Only the plaintiff's counsel was present. He informed the court that he was instructed to mention on behalf of the defendant's counsel. However, when asked he was not able to explain the absence of the defendant's counsel. The plaintiff's counsel's reply to the court's query was merely:

> I was in Ipoh Court when my office SMS me to mention on defendant's behalf, which I agreed. I do not know the reason for the request for me to mention on their behalf.

This was not the first time that the defendant's counsel was absent. He was also absent during the case management hearing of 18 May 2004 (and only asked the plaintiff's counsel to mention on his behalf).

Secondly, the defendant had failed to comply with the court's direction given during the case management proceeding of 8 February 2005. During the case management on 8 February 2005, the learned counsel for the defendant had informed the court of the defendant's intention to amend the statement of defence. He again requested for an adjournment. Although it was rather late for the defence to amend its pleading, considering that the case was registered in 2003 and that the proceeding in respect of the case was already at the stage of case management (the Form 63 was filed in March 2004 and case management hearing had already begun in May 2004); and, moreover, previously on 27 September 2004 the court had already granted the defence an adjournment, yet, nonetheless, the court as well as the counsel for the plaintiff were kind enough to allow an adjournment to enable the defendant to make their application to amend the statement of defence. Accordingly, the court adjourned the case management hearing and directed the defence to file its application to amend the statement of defence on or before 15 March 2005; and the court fixed 18 July 2005 as the date for the next case management proceeding. However, on 18 July 2005, not only was the counsel for the defendant absent without giving any reason, the court was also informed by the learned counsel for the plaintiff that the defence had not filed their application to amend the statement of defence.

I must also add here that, in the previous case management proceedings, the court as well as the plaintiff's counsel had been very accommodative to the defendant's counsel. The absence of the defendant's counsel on 18 May 2004 without a good reason had already been mentioned. It should be noted that on that day (18 May) the plaintiff's counsel had kindly mentioned on his behalf and the court did not penalise the defence for the absence of counsel but granted the defence an adjournment; and the case management hearing was adjourned to 27 September 2004.

But there was yet another disquieting incident, and it was during the case management proceeding of 27 September 2004 (2nd case management hearing date). Again the defence was not ready for case management although the defendant's counsel was present; and the reason given was weak considering that there was a long lapse of more than four months since the previous case management date of 18 May 2004. After a lapse of four months, the counsel

for the defendant should not have come to court and said that he had just taken over conduct of the matter and that he was yet to obtain some documents from the previous solicitor, when, in the first place, notice of change of solicitors was served on the plaintiff way back on 17 May 2004 (however, in passing, I must remark here that a copy of the notice does not appear to be in the court's file). He has had ample time to do the needful. But be that as it may, the learned counsel for the plaintiff did not complain and the court once again granted an adjournment. The case management hearing was adjourned to 8 February 2005, and I have mentioned earlier in this judgment what transpired on 8 February 2005.

To sum up, the unfortunate scenario appears to be that although Form 63 was filed way back in 11 March 2004, yet on 18 July 2005, that is to say, more than one year and four months later, due to the apparent lackadaisical attitude or lack of interest on the part of the defence in the proceeding, the court was still unable to proceed with the case management proper. There must, however, be a limit to the court's patience.

It is clear from the above that by being absent on 18 July and not complying with the court's directions the defendant is abusing the court's and the plaintiff's past generosity towards the defence.

My above decision was based on O. 34 r. 7 of the Rules of the High Court 1980.

[Judgment for the plaintiff with costs; defendant's counter-claim dismissed with costs]